Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-246

JAMES McCABE, individually and in a representative capacity on behalf of a class of persons consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving sale, possession or control of marijuana,

Petitioner,

v.

JAMES BURGESS, State's Attorney for Champaign County; and JAMES SKELTON, Champaign County Treasurer; and LAWRENCE JOHNSON, State's Attorney for Champaign County from 1968 through 1972; and CHAMPAIGN COUNTY, a body corporate and politic,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, James McCabe, prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Illinois entered in this cause on April 18, 1979.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois has been reported at 75 Ill.2d 457; 27 Ill.Dec. 501; 389 N.E.2d 565 (1979) and is reproduced in Appendix A attached hereto.

The opinion of the Appellate Court of the State of Illinois for the Fourth Judicial District is reported at 57 Ill.App. 3d 450; 15 Ill.Dec. 57; 373 N.E.2d 327 (4th Dist. 1978) and is contained herein as Appendix B. The Memorandum Opinion of the Circuit Court of the Sixth Judicial Circuit, Champaign County, Illinois is unreported and is reprinted as Appendix C hereto.

JURISDICTION

The judgment and opinion in this case was rendered on April 18, 1979. (R. 1) Rehearing was denied on May 30, 1978. (R. 4) The Mandate of the Supreme Court of Illinois was issued on June 13, 1979. (R. 2) Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the members of Petitioner's purported class have a fundamental right of association that entitles them to form a class to petition the County of Champaign, State of Illinois, for relief from void convictions.

2. Whether the Due Process Clause of the Fourteenth Amendment to the United States Constitution is violated when disallowance of class relief from unconstitutional convictions results in an effective denial of each class member's right to notice and an opportunity to be heard.

3. Whether the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is violated by a de facto deprivation of meaningful access to the courts to obtain relief from unconstitutional convictions.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Amendment XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Civil Practice Act, §57.2 (Ill.Rev.Stat. 1978, ch. 110, ¶57.2)

Prerequisites for the maintenance of a class action

(a) An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:

(1) The class is so numerous that joinder of all members is impracticable.

(2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.

(3) The representative parties will fairly and adequately protect the interests of the class.

(4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

STATEMENT OF THE CASE

Petitioner, James McCabe, represents a class of persons situated in Champaign County, Illinois, who were convicted under sections of the 1969 Uniform Narcotic Drug Act, ILL.REV.STAT. 1969, ch. 38, ¶22-1 et seq. Those sections were declared unconstitutional as violative of equal protection in *People v. Thomas McCabe,* 49 Ill.2d 338; 275 N.E.2d 407 (1971). Retroactivity was then granted to that decision in *People v. Meyerowitz,* 61 Ill.2d 200; 335 N.E.2d 1 (1975). Later, Petitioner filed suit on behalf of the aforementioned class to obtain the relief promised in *Meyerowitz;* i.e., a recovery of fines and costs and expunction of criminal records that arose from void convictions.

All prerequisites necessary for the maintenance of a class action were properly pleaded, including a common issue as to whether the retroactive relief accorded by *Meyerowitz* could be granted to the plaintiff class. An identical suit in Peoria County, Illinois, *Sparks v. Calkins,* No. 72-E-871 (Judgment attached hereto as Appendix D), had already been certified as a class. The Circuit Court of Champaign County, Illinois, ignored that precedent, however, and held against Petitioner, dismissing his Amended Complaint. The Appellate Court of Illinois for the Fourth Judicial District reversed the trial court and ordered that court to certify the class. An appeal was taken to the Supreme Court of Illinois, and on April 18, 1979, the Appellate Court was reversed and the judgment of the trial court affirmed. Rehearing was denied on May 30, 1979, and the Court's Mandate issued on June 13, 1979. This Petition is being filed within ninety days following the entry of the final order in this cause.

ORIGIN OF THE FEDERAL QUESTIONS

The federal questions raised in this Petition have always been at the core of this suit. The current litigation originated with a successful equal protection challenge to the statutory sections under which the members of Petitioner's class were convicted. *People v. Thomas McCabe, supra.* Though the later suit of *People v. Meyerowitz, supra,* created a right to completely redress void convictions, that right is meaningless so long as there exist persons who have not yet obtained relief. Thus, the denial of equal protection remains until the unconstitutional convictions are remedied.

The freedom to associate to conduct litigation is expressed in every class action, and was so alleged in the instant suit in Petitioner's Amended Complaint which noted a "community of interest in the remedy and subject matter among all who make up the class." By denying class relief in the case at bar, the Circuit Court of Champaign County and the Supreme Court of Illinois negated Petitioner's freedom to associate for purposes of litigation. Hence, the associational issue raised initially in Petitioner's Amended Complaint was denied in derogation of the First and Fourteenth Amendments. This presents an issue over which this Court can maintain jurisdiction.

Petitioner's Amended Complaint claimed his right to Due Process of law as guaranteed by the Fourteenth Amendment. He demanded that persons involved in this suit be given "actual notice of [their] legal position and remedies." The right to notification is a crucial aspect of Due Process, since an opportunity to be heard is meaningless without notice of the existence of a cause. Both the Circuit Court of Champaign County and the Supreme Court of Illinois misconstrued Petitioner's interest in giving notice, believing that the demand was alleged as the common issue uniting the class. Those courts then con-

cluded that the common question in a class action could not be based on the right to give notice.

The common issue in this suit is not notice; it is whether the relief promised in *Meyerowitz* may be granted to this class. The right of Petitioner to give notification arises because it is the only way for the class members to learn of their ability to vindicate their unlawful convictions. It is also the sole method of achieving meaningful litigation of this matter without creating disproportionate expenses that would be engendered by individual litigation. Furthermore, given recent relaxation of the rules regarding solicitation of clients, especially in the area of vindication of rights, (*See:* E.g., *In re Primus,* 436 U.S. 412 (1978)), there is nothing offensive in Petitioner's claim of his right to give notice. Therefore, since notice has not been given to the members of the class, it is likely that they do not even know of their right to redress their void convictions. Hence, the issue of whether Due Process was granted to Petitioner remains a claim that may properly be considered by this Court.

Likewise, since fundamental rights aimed at assuring equal access to judicial tribunals are integral to this matter, and since enjoyment of those rights have been unequally burdened, there has been unjustified interference with Petitioner's Fourteenth Amendment guarantee of Equal Protection. This is in addition to the denial of equal protection that resulted in the class members' initial convictions. Denial of litigational equal protection is subsidiary to the other issues raised in this Petition, and may thus be ruled upon by this Court at the present time, even though this Petition raises that issue for the first time.

REASONS FOR GRANTING WRIT

I.

The members of petitioner's purported class have a fundamental right of association that entitles them to form a class to petition the County of Champaign (Illinois) for relief from void convictions.

It is undeniable that the penalties assessed the asserted plaintiff class resulted from void convictions. *People v. Meyerowitz,* 61 Ill.2d 200, 211; 335 N.E.2d 1, 7 (1975). *Meyerowitz* grants Petitioner the right to obtain redress from the unconstitutional state action, but the Supreme Court of Illinois held that aggrieved parties must individually present their claims to obtain relief. *McCabe v. Burgess,* 75 Ill.2d 457; 27 Ill.Dec. 501; 389 N.E.2d 565 (1979). Joinder of plaintiffs would also be denied, because under Illinois Civil Practice, both class actions and joinder of plaintiffs require a "common question of law or fact." ILL.REV.STAT. 1978, ch. 110, ¶23. According to the Illinois Court, there are no longer any issues common to the class; and thus joinder, as well as the class action would be barred. 75 Ill.2d at 471 (Moran, J., dissenting).

Yet, this prohibition against group relief has the de facto effect of making unavailable any relief whatsoever. Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois,* 42 ILL.L.REV. 518, 519-20 (1947). As one authority has noted, in a case such as the matter at bar, individual actions result in a denial of "substantive justice" because they create "disproportionate expenditures of money, time and effort." Homburger, *State Class Actions and the Federal Rule,* 71 COL.L.REV. 609, 641 (1971). If every person unconstitutionally convicted would have to obtain separate counsel and initiate individual suits, few of them would seriously press their claims. Abram, *Access to the Judicial Process,* 6 GA.L.REV. 247, 263 (1972). A class

action, is, therefore, the sole means of obtaining relief for *all* aggrieved persons because it spreads the cost of litigation among the class members, thus making relief from the illegal conduct an actuality. 1 H. NEWBURG, NEWBURG ON CLASS ACTIONS, §1160j at 282-3 (1977).

Although determinations as to the propriety of a class action are generally considered discretionary (*Montgomery v. Rumsfeld,* 572 F.2d 250, 255 (9th Cir. 1978); 3B J. MOORE, FEDERAL PRACTICE, ¶23.50 at 23-437 (2d ed. 1979)), Petitioner contends that his right to a class action is of constitutional dimension. That right evolves from long-recognized freedoms of association and assembly emanating from the First Amendment. The relationship between group litigation and associational freedoms was first remarked upon in *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449 (1958):

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly . . . It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech . . . Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious, or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny. *Id.* at 460-1 (citations omitted); Cf. *Bates v. City of Little Rock,* 361 U.S. 516, 523 (1960).

By depriving Petitioner of class relief in this suit, the Supreme Court of Illinois has effectively denied a remedy to the majority of the class members who probably do not

even know of the availability of redress. Those persons are entitled to a remedy because of their unconstitutional convictions. *Meyerowitz, supra.* Only by granting them their right of association can the unconstitutional deprivation be corrected.

The demands of justice and the right to associate weigh heavily in favor of Petitioner. In *NAACP v. Button,* 371 U.S. 415 (1963), this Court upheld the right of the members of a civil rights organization to associate and conduct litigation aimed at redressing constitutional deprivations. One of the bases of the decision was the growing recognition that persons who are politically weak can make themselves heard only by joining with others similarly situated. *Id.* at 429-30. Perhaps the most eloquent exposition of the efficacy of association was made in a dissent to that case:

> Freedom of expression embraces more than the right of an individual to speak his mind. It includes also his right to advocate and join with his fellows in an effort to make that advocacy effective . . . And just as it includes the right jointly to petition the legislature for redress of grievances, . . . so it must include the right to join together for purposes of obtaining judicial redress. We have passed the point where litigation is regarded as an evil that must be avoided if some accommodation short of a lawsuit can possibly be worked out. Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights. *Id.* at 452-3 (Harlan, J., dissenting) (citations omitted).

Following *Button,* several group legal services decisions were supported by reference to First Amendment associational rights. In *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967), this Court commented at 222: "We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded

by the Bill of Rights." A later case stated a principle that is even more in accord with the case at bar. ". . . collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union v. State Bar of Michigan,* 401 U.S. 576, 585 (1971); Cf. *In re Primus,* 436 U.S. 412, 422-432 (1978).

The associational freedoms involved in class suits have only recently become articulated. However, it is apparent that the instant case fits well within the line of cases beginning with *NAACP v. Alabama ex rel. Patterson.* Not one, but two related First Amendment rights support the class action procedure — associational freedoms, and the right to petition the government for a redress of grievances. Those rights must be protected from state intrusion, or, as one author has observed, they will lose their worth:

> [I]f rights make sense at all, then the invasion of a relatively important right must be a very serious matter. It means treating a man as less than a man, or as less worthy of concern than other men. The institution of rights rests on the conviction that this is a grave injustice, and that it is worth paying the incremental cost in social policy or efficiency that is necessary to prevent it. R. DWORKIN, TAKING RIGHTS SERIOUSLY 199 (1977).

Therefore, it may readily be seen that the purported class has been unconstitutionally denied the relief decreed by *Meyerowitz.* Plaintiffs were stripped of their good reputations as well as being forced to pay fines and costs to the County of Champaign as a result of their void convictions. If they also lose their associational freedoms, recovery of what properly belongs to the class members may not be meaningfully obtained due to the disproportionate expense of individual litigation. The State of Illinois, through its judicial system, has promised relief to those it wronged.

So far, however, there has been no significant relief, and both the County of Champaign and the State of Illinois remain unjustly enriched at the expense of Petitioner's class. Since the freedom to associate is a fundamental right, this Court has stated that it will strictly scrutinize any interference with that right. *United Transportation Union.* Petitioner maintains, that subjected to this analysis, the decision of the Supreme Court of Illinois in *McCabe v. Burgess* cannot stand.

II.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution is violated when disallowance of class relief in the case at bar results in an effective denial of each class member's right to notice and an opportunity to be heard.

The Due Process Clause of the Fourteenth Amendment prohibits a state from depriving individuals of life, liberty or property. In the case at bar, all members of the purported class forfeited property; i.e., the fines and costs paid as a result of their void convictions. J. NOWAK, R. ROTUNDA, AND J. N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 492 (1978). It can also be argued that these persons were deprived of their liberty, since their reputations and records as law-abiding citizens have been tarnished by the unconstitutional action of the state. Cf. L. TRIBE, AMERICAN CONSTITUTIONAL LAW §10-11 at 528-30 (1978). Furthermore, four other liberty-related interests identified by Professor Michelman have been usurped by the County of Champaign in denying class relief; and thus in effect eliminating redress altogether:

> *Dignity values* reflect concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate. *Participation values* reflect an appreciation of litigation as one of the modes

> in which persons exert influence, or have their wills counted, in societal decisions they care about. *Deterrence values* recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable. *Effectuation values* see litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights — Part I*, 1973 DUKE L.J. 1153, 1172-3 (footnotes omitted).

Those values can be restored only when the relief declared in *Meyerowitz* is meaningfully granted to the class represented by Petitioner. However, the limitation imposed on that remedy by the Supreme Court of Illinois makes actual relief illusory because of a denial of procedural due process.

The aggrieved person in Petitioner's class lack both an opportunity to be heard, and notice of their right. A landmark decision in the area of procedural due process established that "[The] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306, 314 (1950). It is quite doubtful that the class members follow decisions of the courts and would know of their right to redress the wrong that was foisted upon them. A class action is thus the only method of remedying this procedural defect. It can provide the notice necessary before a full vindication of rights denied the class will take place. In addition, this procedure will adjudicate the common claim that remains and will continue to exist so long as there are persons who have void convictions on their records — denial of Equal Protection of the laws as guaranteed by the United States Constitution. The recognition of that deprivation by the Illinois Supreme Court

in *People v. McCabe* and *People v. Meyerowitz* entitles the members of the class to a refund of costs and expunction of criminal records. Hence, the County of Champaign is able to divide and conquer the class by providing a token remedy that actually deters seeking redress since the individual expenses are disproportionate to the potential recovery. Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois*, 42 ILL.L.REV. 518, 519-20 (1947).

Analysis of the de jure remedy allowed members of Petitioner's class using the factors enumerated in *Mathews v. Eldridge*, 424 U.S. 319 (1976), indicates the Constitutional infirmity of the Illinois Supreme Court's decision. Mathews lists three interests that must be taken into account when testing a government-created remedy against the requirements of the Due Process Clause:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requisites would entail. *Id.* at 335.

The private interest involved in this case is a demand for vindication of rights unconstitutionally denied to the members of the purported class. Second, if the state really expected these class members to secure restoration of their rights, the state would most likely prefer the class action procedure which has the effect of adjudicating all of the claims at once rather than tying up the courts with repeated readjudication of the identical matter. Thus, the substitute for a class action is no procedural substitute at all. Instead, it is but a mirage that ostensibly creates a remedy, but in fact denies all but limited relief to few individuals.

Finally, the state would not be additionally burdened by a class action rather than a multitude of individual actions. If every void conviction were separately challenged, the financial burden upon the County would be greater than would be imposed by a class suit since so much more judicial time and the time of state's attorneys would be involved. Hence, Petitioner's right to a class action as a guarantee of procedural due process is merited under all three of the standards listed in *Mathews.*

Petitioner's right to a class action is further strengthened by a recent jurisprudential trend toward promoting meaningful access to the courts. The door to "meaningful access" was opened with the decision in *Boddie v. Connecticut,* 401 U.S. 371 (1971), a case holding that the Due Process clause demands waiver of filing fees for indigents who are otherwise unable to gain court access to obtain divorces.* Later decisions tried to narrow the bold propositions advanced in *Boddie*; e.g., *U.S. v. Kras,* 409 U.S. 434 (1973); *Ortwein v. Schwab,* 410 U.S. 656 (1973), yet dissents in those cases recognized the growing right to significant access to the judicial process. For example, in his dissent to *Ortwein,* Justice Douglas noted: "We have recognized that token access [to the courts] cannot satisfy the requirements of due process." 410 U.S. at 662-3 (Douglas, J., dissenting). It is all too easy, as Justice Douglas suggested, to provide "token access" to the courts, but deny actual due process. By erecting barriers to relief from unconstitutional deprivations, the government has made the fact of recovery "a mirage." R. SPURRIER, TO PRESERVE THESE RIGHTS 88 (1977). Significant access to the courts in the instant case

*Although Justice Harlan was careful to limit his opinion to the facts of the case, Justice Brennan noted in a concurring opinion that the right to significant court access is universal, and cannot be limited merely to abolition of filing fees for indigents in divorce actions. *Id.* at 387 (Brennan, J., concurring).

may be achieved only through a class action, the proper procedural guarantee of an actual vindication of rights. Abram, *Access to the Judicial Process,* 6 GA.L.REV. 247, 262 (1972).

The County of Champaign has unjustly enriched itself even though simple hornbook law states that ". . . restitution is generally awarded when the defendant has gained a benefit that it would be unjust for him to keep, though he gained it honestly." D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 224 (1973); Cf. *Gonzales v. State,* 68 Cal.App.3d 621, 631; 137 Cal.Rptr. 681, 687 (1st Dist. 1977). Hence, it is clear that since restitution is required, it must be provided. Petitioner has a right to relief and is entitled to a remedy. If that remedy is to possess any realism, and the right is not to be emasculated, the demands of due process insist that the procedure to be used is a class action.

The Supreme Court of Illinois held in this case that a class action is improper because the issues common to the class were resolved in *Meyerowitz.* Yet, neither the Illinois Class Action Statute (ILL.REV.STAT. 1978, ch. 110, ¶57.2), nor the Due Process clause of the Fourteenth Amendment requires that common issues be unresolved. *McCabe v. Burgess,* 75 Ill.2d at 470 (Moran, J., dissenting). In fact, at least one federal case applying FEDERAL RULE OF CIVIL PROCEDURE 23 (a rule similar to the Illinois law), was not bothered that the questions common to the class had previously been litigated, because those questions were still viable. *Neely v. U.S.,* 546 F.2d 1059, (3d Cir. 1976) *reh. denied* 554 F.2d 114 (3d Cir. 1972); *enforced sub nom* as *Gulish v. U.S.,* 78 F.R.D. 515 (W.D. Pa. 1978) was a class action suit filed on behalf of persons in the Western District of Pennsylvania who had been convicted of violating wagering tax statutes. Those statutes had been held unconstitutional in *Marchetti v. U.S.,* 390 U.S. 39 (1968) and *Grosso v. U.S.,* 390 U.S. 62 (1968). Subsequently, *U.S. v. U.S. Coin and*

Currency, 41 U.S. 715 (1971) accorded full retroactivity to the earlier decisions. Then, *U.S. v. Sams*, 521 F.2d 421 (3d Cir. 1975) allowed a district court to annul convictions under the unconstitutional statute. Finally, *Neely* was filed as a class action to obtain the relief promised in the earlier decisions. The Third Circuit Court of Appeals found the class action to be proper, and it was certified *sub nom* as *Gulish v. U.S.* Procedurally, *Neely* and the case at bar are indistinguishable. The Supreme Court of Illinois found the cases to be different because the federal suit was filed as a suit for refund under the Tucker Act, 28 U.S.C. §1346(a)(2) (1978). If Illinois had a similar statute, the present cause of action would have been based on that law. However, as specified in *People v. Meyerowitz*, the "action to recover fine monies paid under an unconstitutional statute would more nearly resemble the common law action for money had and received." 61 Ill.2d 200, 212; 335 N.E.2d 1, 7. Since *Neely* and *McCabe* are really identical, Petitioner contends that the authority of the federal case commands the use of a class action here.

Thus, if the aggrieved persons' rights are to have any meaning, the Due Process Clause of the Fourteenth Amendment to the United States Constitution demands reversal of the decision of the Supreme Court of Illinois. It is manifestly clear that Petitioner and the members of his purported class have not received meaningful access to the courts sufficient to genuinely allow redress for the wrong of the unconstitutional convictions. The courts have failed to provide actual notice to those persons convicted under the unconstitutional statute, and have thereby denied them an opportunity to be heard. If adequate notice had been provided, there would be a lesser claim of entitlement to a class action. However, the County of Champaign has failed to take any steps to right the wrong it committed.

Even though the convictions were obtained under the belief that the law was valid and constitutional, there is now a duty to make restitution. Therefore, to avoid disproportionate expense in recovering what rightfully belongs to the class members, the County of Champaign must make meaningful Petitioner's opportunity to be heard and grant certification to the class he represents.

III.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is violated by a de facto deprivation of meaningful access to the courts to obtain relief from unconstitutional convictions.

One aspect of the Equal Protection guarantee is that "all individuals are accorded fair treatment in the exercise of fundamental rights." J. Nowak, R. Rotunda, and J. N. Young, Handbook on Constitutional Law 518 (1978). The earlier sections of this Petition established that there are several fundamental rights involved in the instant case. Among other things, the County of Champaign has denied Petitioner's class their right to meaningful access to the courts. This denial, or differentiation in treatment between those persons who petition the courts as individuals, and the vast majority who do not even know of their rights, triggers the shield of the Equal Protection Clause.* *Boddie v. Connecticut*, 401 U.S. 371, 388 (1971) (Brennan, J., concurring). Other disparate treatment includes certification of an identical class action in Peoria County, Illinois while denying that procedure in Champaign County. *See* Appendix D.

The rights deprived Petitioner involve that component of equal protection described by Professor Dworkin as

* The Equal Protection Clause is already an integral part of this suit since it was used to overturn the statutory sections under which Petitioner and the class members were convicted. *People v. T. McCabe.*

the right to *equal treatment.* Dworkin defines that right as the ". . . right to an equal distribution of some opportunity or resource or burden." R. DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1977). By not certifying this class, there probably will be no distribution at all of that to which Petitioner's class is entitled. The results could be detrimental to a well-ordered judicial system. The Washington Supreme Court recently decided a case involving a state civil service employee who wished to appeal his discharge, but could not afford the filing fees and costs. In finding for the plaintiff, the Washington Court noted the importance of providing access to the judicial system:

> Failure to provide equal access to the courts demonstrates not only a poverty of sensitivity to social problems but also is fraught with the dangers of alienating our citizenry from the system and encouraging self-help with concomitant breaches of the peace and likely overtones of violence. *Carter v. University of Washington,* 85 Wn.2d 391, 394; 536 P.2d 618, 620-1 (1975).

It is doubtful that the disaffected members of this purported class will breach the peace as a result of the adverse decision of the Supreme Court of Illinois. Instead, they are making their final appeal to the highest tribunal in the land. This is a last attempt at seeing whether the judicial system of this country can offer them a substantive remedy that is more than the mere illusory remedy already possessed. Undoubtedly, it would be inconvenient and expensive for the County of Champaign to return to the class what was lawfully taken at the time of the original convictions. Yet inconvenience alone does not justify a continuing wrong. *Meyerowitz* offered a reprieve to the members of this class by applying *McCabe* retroactively. Petitioner's class was granted an opportunity that few offenders are given — a chance to begin anew with a clean

record. That chance is meaningless, however, when the government keeps it a secret. The burden of notice in this class action will be upon the Petitioner. Thus, the only expense the County will incur is in refunding the fines and costs and expunging the records of the members of the purported class. Those expenses are not unique to a class action, because they would also arise if it was actually thought that the aggrieved parties would individually seek to clear their void convictions.

Therefore, Petitioner's fundamental rights of association, petition, and meaningful access to the courts have been unequally burdened. This should subject the decision of the Supreme Court of Illinois in the case at bar to the strictest scrutiny. Under such a test, that decision must fall.

CONCLUSION

This application for a Writ of Certiorari presents Petitioner's last attempt to obtain a meaningful adjudication of the purported class' right to recovery of fines and costs assessed incident to void convictions. There will be no significant access to the courts without the class members receiving notice that they have been wronged. Although notice is not a common issue binding the class, it is essential to making the rights promised in *Meyerowitz* become a reality. The act of notification is not solicitation; and is in fact necessary to a vindication of rights. *Button* and *Primus* relaxed the non-solicitation rules when fundamental rights were at stake. Without notification, the effect will be to perpetuate the archaic and totally discredited position that the remedy available to the class members be put beyond their grasp because non-solicitation rules make knowledge of that remedy a secret. Thus, the right to notification in the instant matter is but a simple logical

step away from the earlier cases. Denial of this application will result in a deprivation of several of Petitioner's fundamental freedoms, but more importantly, it will diminish the class members' faith that the judicial system of their country can provide a significant remedy for every wrong. For these reasons, Petitioner prays for the issuance of a Writ of Certiorari to obtain review of this case.

Respectfully submitted,

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APPENDIX A

MR. JUSTICE RYAN delivered the opinion of the court:

James McCabe brought this suit to enforce the holdings of our prior decisions of *People v. McCabe* (1971), 49 Ill. 2d 338, and *People v. Meyerowitz* (1975), 61 Ill. 2d 200, through a class action. (James McCabe is not the same person as the defendant in *People v. McCabe.*) The Champaign County circuit court dismissed the class action. The appellate court reversed. (57 Ill. App. 3d 450.) We granted leave to appeal. The primary issue presented for review is the validity of the trial court's refusal to certify a class action.

James McCabe has alleged that he was convicted and paid a fine under the Illinois Uniform Narcotic Drug Act (Ill. Rev. Stat. 1969, ch. 38, pars. 22-1 through 22-49.1). That law, as it related to marijuana, was declared unconstitutional in *People v. McCabe* (1971), 49 Ill. 2d 338. Subsequently, this court ruled that all those convicted under the Act had a right to the expungement of their conviction and the return of any fine money and court costs attributable to those convictions. (*People v. Meyerowitz* (1975), 61 Ill. 2d 200.) McCabe now seeks to bring this action on his own behalf and as a representative "of a class of persons, consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving sale, possession or control of marijuana." Though not shown on the face of the pleadings, the briefs, the trial court, and the appellate court considered the class that McCabe purports to represent as being only those persons convicted in Champaign County.

On the defendant's motion, the trial court dismissed McCabe's amended complaint. In a written memorandum the trial court specifically found that the question of law common to the members of the purported class had been

decided in *People v. McCabe* and *People v. Meyerowitz*. The court also found that a class action would not in any way relieve the court or the litigants of any burden or time expended in resolving the factual questions material to the claimants' right to recover and that the factual questions that would be involved would require the examination of each individual case. Thus the court found that there were no unresolved questions of law or fact common to the members of the class and that maintaining the class action would not result in an increased efficiency in the adjudication of the claims. The court also rejected McCabe's claim that the right to notify each member of the class of his right of expungement and reimbursement was a common question of law or fact which would support a class action. The court noted that McCabe's right, and the right of the other members of the class, was to have the convictions expunged and to recover the fines and costs that had been collected. McCabe and the other members of the purported class would not have a right to have the others who had been convicted under the same statute notified of their right of expungement and recovery.

This action began prior to enactment of the Illinois class action statute (Ill. Rev. Stat. 1977, ch. 110, pars. 57.2 through 57.7). This court has held that since the statute is procedural in nature, it is applicable to pending cases. (*Steinberg v. Chicago Medical School* (1977), 69 Ill. 2d 320, 337.) The class action statute sets out very clearly the requirements for maintenance of a class action.

> "Prerequisites for the maintenance of a class action.
>
> (a) An action may be maintained as a class action in any court of this State and a party may sue or be sued as a representative party of the class only if the court finds:
>
> (1) The class is so numerous that joinder of all members is impracticable.

> (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
>
> (3) The representative parties will fairly and adequately protect the interest of the class.
>
> (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy." (Ill. Rev. Stat. 1977, ch. 110, par. 57.2.)

This section of the statute, in essence, codifies the previous holdings of this court as to the prerequisites to the maintenance of a class action. Although the trial court in this case rendered judgment prior to the effective date of the statute, it, nonetheless, bottomed its decision on the absence of certain prerequisites which had been considered essential under the case law of this State, and which have been incorporated in the statute as prerequisites. Under the statute, the proponent of the class action has the burden of establishing these prerequisites and the court must find them present before it can sanction the maintenance of the action as a class action. (Ill. Ann. Stat., ch. 110, par. 57.2, Supplement to Historical and Practice Notes (Smith-Hurd Supp. 1978).) Here the trial court specifically found the absence of certain of these prerequisites, notably: (1) Questions of law or fact common to the class which predominate over any questions affecting only individual members, and (2) the class action would be an aid in efficient adjudication of the controversy.

Class certification under Federal Rule 23 of the Federal Rules of Civil Procedure is a matter within the discretion of the trial court. (*Montgomery v. Rumsfeld* (9th Cir. 1978), 572 F.2d 250, 255; *City of New York v. International Pipe & Ceramics Corp.* (2d Cir. 1969), 410 F.2d 295, 298.) When the trial court applies the criteria of Rule 23 to the

facts of the case, it "has a broad discretion in determining whether the action may be maintained as a class action and its determination should be given great respect by a reviewing court." (3B J. Moore, Federal Practice sec. 23-437 (2d ed. 1978).) Only a clear abuse of discretion or an application of impermissible legal criteria as shown justifies a reversal of the trial court. (*Yamamoto v. Omiya* (9th Cir. 1977), 564 F.2d 1319, 1325; *Carey v. Greyhound Bus Co.* (5th Cir. 1974), 500 F.2d 1372, 1380.) This has been the standard of review which this court has applied in cases where discretion has been vested in the trial court. In *Whitney v. Madden* (1948), 400 Ill. 185, 190, this court stated: "[W]here the trial court has the power of judicial discretion and exercises it without abuse, and within the scope of the law, such action will not be disturbed by the reviewing courts." In *Fender v. St. Louis Southwestern Ry. Co.* (1971), 49 Ill. 2d 1, 4, this court also stated: "In this case the appellate court reversed the trial court, apparently not because that court had abused its discretion, but because the appellate court felt that the trial court's discretion had not been 'wisely exercised.' In our opinion the appellate court misapprehended its role and misapplied the governing principles."

In our opinion, the appellate court in this case likewise misapprehended its role and misapplied the governing principles with regard to the holding of the trial court that the two prerequisites to a class action set out above were not present in the case. The appellate court, in reviewing this determination of the trial court, did not assess the discretion exercised by the trial court and did not find that it had abused the discretion vested in it. Instead, the appellate court itself assessed the facts of the case and concluded: "This is the kind of case that is well suited for a class action." The court then reversed the

circuit court and remanded the cause for further proceedings. 57 Ill. App. 3d 450, 455.

Although the trial court considered the size of the class and the fairness of a class action to the members of the class, we view as controlling its determination that there were no questions of law or fact common to the members of the class to be litigated in a class action and that the class action would not result in any increased efficiency to the court or to the litigants in the adjudication of the claims. Under section 57.2 of the Civil Practice Act these prerequisites must be established by the proponents of the class action. We find that the determination of the trial court as to the absence of these two criteria did not constitute an abuse of discretion.

The common issues that would have justified maintaining this class action were the unconstitutionality of the Uniform Narcotic Drug Act as it applied to marijuana (Ill. Rev. Stat. 1969, ch. 38, pars. 22-1 through 22-49), and the right of those who had been convicted under the Act to have their convictions expunged and their fines and costs refunded. These were the two common questions that predominated over questions which would affect only individual members of the class, such as the nature of the offenses of which they were convicted and the amount of fines and costs paid. In a class action it is appropriate to litigate the questions of law or fact common to all members of the class and after the determination of the common questions to determine in an ancillary proceeding or proceedings the questions that may be peculiar to individual class members. (*Steinberg v. Chicago Medical School* (1977), 69 Ill. 2d 320, 340-42.) However, the question of the validity of the statute was decided by this court in *People v. McCabe* and the right of those convicted under the invalid statute to have their convictions expunged and

their costs and fines refunded was established in *People v. Meyerowitz.* Thus, the common questions which predominate over the questions that relate only to the individual class members had been decided in these other cases. These questions are no longer controverted. All that remains are the questions that relate only to individuals who were convicted under the invalid statute: (1) Of what offense was each convicted? and (2) What were the fines and costs paid? These questions must be determined as to each individual. There is no common question which predominates to be adjudicated independently of these questions that relate only to the individuals.

McCabe has cited *Ross v. City of Geneva* (1978), 71 Ill. 2d 27, and *Gulish v. United States* (W.D. Pa. 1978), 78 F.R.D. 515, as precedent for certifying this class action despite the resolution of the common questions of validity, expungement and reimbursement. Both cases are inapposite. In *Ross* the class action was brought to resolve the validity of an ordinance imposing a surcharge on electric bills. Though individual surcharges would later be examined, the predominant question was the ordinance's validity. The general validity question and the individual remedy questions were brought as part of the same proceeding. Similarly in *Gulish,* the Federal district court allowed the class action to proceed because the predominant question of the right to return of fines under the Tucker Act had been resolved in the same action by appellate review. (*Neely v. United States* (3d Cir. 1976), 546 F.2d 1059, *rehearing denied* (3d Cir. 1977), 554 F.2d 114.) In contrast, the action here is a separate and distinct case from the prior determinations in *People v. McCabe* and *People v. Meyerowitz.* At no time were there common questions in this action which predominated over the individual issues.

McCabe alleged that the common question is whether the class members may receive actual notice of their potential legal remedies to have their conviction records expunged and their fines and costs refunded. The plaintiff has misunderstood the common-question requirement. The trial court held that although notice is an element of a class action, the simple desire to notify other potential claimants is not justification, in and of itself, for the maintenance of a class action. The court held that McCabe is entitled to the expungement of his record and the recovery of his fine, but that he has no right or interest in the simple act of notifying others who might be entitled to similar relief. This holding does not constitute an abuse of the trial court's discretion. Under our class action statute, the giving of notice to other members of the class is not mandatory; therefore, the class members have no clear right to notice. In fact, the determination of whether an action may be maintained as a class action and the determination of whether notice must be given, and in what manner and to whom, are separate discretionary determinations which the trial court must make. (Ill. Rev. Stat. 1977, ch. 110, par. 57.4.) Notice, therefore, is not a common question of law or fact which will satisfy the common-question prerequisite.

In this case, tied closely to the absence of the common-question prerequisite is the determination by the court that a class action would not result in increased efficiency in adjudicating the claims of those who had been convicted under the invalid statute. This requirement, which found its pronouncement in case law, is now incorporated in section 57.2(4) of our class action statute (Ill. Rev. Stat. 1977, ch. 110, par. 57.2(a)(4)), which requires a finding that the class action is an appropriate method for the fair and efficient adjudication of the controversy. The supple-

ment to the historical and practice notes to this section states that this requirement is derived from Rule 23(b)(3) of the Federal Rules of Civil Procedure. (Ill. Ann. Stat., ch. 110, par. 57.2(a)(4), Supplement to Historical and Practice Notes (Smith-Hurd Supp. 1978).) In a recent publication on class actions in Illinois, published before the adoption of our statute, the author, speaking of the requirements of Federal Rule 23(b)(3), states:

> "Under this prerequisite, the court determines whether a class action in a particular case can best secure the economies of time, effort, and expense, and promote uniformity of decision or accomplish other ends of equity and justice sought to be attained in these actions." (Forde, *Class Actions in Illinois: Toward a More Attractive Forum For This Essential Remedy*, 26 De Paul L. Rev. 211, 225 (1977).)

Although our statute requires a finding that the class action "is an appropriate method for the fair and efficient adjudication of the controversy" (Ill. Rev. Stat. 1977, ch. 110, par. 57.2(a)(4)), whereas, Federal Rule 23(b)(3) requires the court to find that a class action "is superior to other available methods for the fair and efficient adjudication of the controversy," the difference in the language does not require us to discard the construction that has been given to the Federal rule as it relates to the economies to be affected through the use of class actions.

The trial court in this case noted there would be no increased judicial efficiency through the use of a class action. Since the questions common to all claims had been previously determined, the court found that the remaining factual questions would require the examination of each court file involved and a separate determination in each case. The court further stated that the "class action would in no way render the disposition of the individual, factual questions any more expeditious." The court also found

that the class action would not avoid a multiplicity of suits. As to the necessity of using the class action to accommodate the claimants and to facilitate recovery by them, the trial court noted that it "has heretofore, on motion of certain defendants in their individual cases, granted the relief decreed in *Meyerowitz* * * *."

For these reasons we hold that the trial court did not abuse its discretion in denying relief to maintain the action in this case as a class action. This does not, however, reflect upon McCabe's right to maintain his individual claim. The judgment of the appellate court is therefore reversed and the judgment of the circuit court of Champaign County is affirmed, and the cause is remanded to the circuit court of Champaign County.

Appellate court reversed;
circuit court affirmed;
cause remanded.

MR. JUSTICE MORAN, dissenting:

I dissent. Initially, I take issue with what I consider to be an unduly narrow view of the phrase "questions of fact or law common to the class," which is part of the second prerequisite for the maintenance of a class action under the statute (Ill. Rev. Stat. 1977, ch. 110, par. 57.2).

In sanctioning the dismissal of the class action, the majority relies primarily on the trial court's determination that, in light of our prior decisions in *People v. McCabe* (1971), 49 Ill. 2d 338, and *People v. Meyerowitz* (1975), 61 Ill. 2d 200, there were no common questions of law or fact to be litigated. Asserting that the common questions (the unconstitutionality of the Uniform Narcotic Drug Act as it applied to marijuana and the right of those convicted to have their convictions expunged and their fines and costs refunded) predominate over any individual ques-

tions, the majority intimates that this action could have been maintained as a class action if the common questions had not been previously resolved. Thus, it is evident that the majority reads the common-question requirement to mean *unresolved* questions of fact or law common to the class. In effect, then, plaintiff's claim is denied class action status merely because another individual has already sought and obtained the relief which plaintiff presently seeks on behalf of the class. In my view, this is an unjust result and one that would allow any potential member of any potential class, regardless of motive, to abort an otherwise valid class action against an alleged wrongdoer.

Here, each potential class member would have the same claim, *i.e.*, expungment of his conviction and the return of any fines and costs paid. The class action would make the right of relief and recovery available to individual class members who, to a large extent, could not otherwise obtain it because they would be uninformed of its availability and because of the expense of a separate lawsuit. (See Gordon, *The Common Question Class Suit Under the Federal Rules and in Illinois,* 42 Ill. L. Rev. 518, 519-20 (1947).) Furthermore, the decision to exercise the common right to relief and recovery would foster a multiplicity of suits, thus defeating another purpose of class action litigation.

Not only does the majority preclude class action status, but the unperceived import of the majority's reasoning will be to deny the right of others similarly situated to join as parties plaintiff. The statutory provision governing joinder of plaintiffs (Ill. Rev. Stat. 1977, ch. 110, par. 23), like the class action statute, requires that there be a "common question of law or fact." Because all common questions have been previously resolved, the majority's

interpretation (that any common questions must be as yet unresolved) would thus also serve to bar the use of joinder.

Additionally, the majority cites the trial court's determination that the class action would not result in any increased efficiency to the court or to the litigants in the adjudication of the claims. It finds that such determination was within the trial court's broad discretionary powers. I disagree. Because it granted defendant's motion to dismiss on the pleadings, the trial court had before it no evidence by which to arrive at such determination. In its order, the court summarily stated, "It is difficult to perceive how proceeding in a class action would in any way relieve the court or litigants of any burden or time expended * * *." It is my opinion that the plaintiff should have been permitted to have a hearing and to present evidence on this matter. For this reason, I feel that the trial court abused its discretion, and the determination which resulted from that abuse should not serve as a basis for the majority's holding here.

In sum, I believe that plaintiff has satisfied the common-question requirement and that the trial court abused its discretion in granting defendant's motion to dismiss. I would therefore reverse the trial court's dismissal of the class action and remand the cause to that court for further proceedings.

MR. JUSTICE CLARK joins in this dissent.

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. 14486 Agenda No. 77-645

JAMES McCABE, individually and in a representative capacity on behalf of a class of persons, consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving sale, possession or control of marijuana,

Plaintiff-Appellant,

v.

JAMES BURGESS, State's Attorney for Champaign County, and JAMES SKELTON, Champaign County Treasurer, and LAWRENCE JOHNSON, State's Attorney for Champaign County from 1968 through 1972; and CHAMPAIGN COUNTY, a body corporate and politic,

Defendants-Appellees.

Appeal from Circuit Court Champaign County

75-C-785

Mr. JUSTICE CRAVEN delivered the opinion of the court:

This case comes on appeal from a trial court order dismissing plaintiff's class action complaint. The Illinois Supreme Court, in the case of *People v. McCabe* (1971), 49 Ill. 2d 338, 275 N.E.2d 407, held that a defendant convicted of the illegal sale of marijuana under section 38 of the 1969 Uniform Narcotic Drug Act (Ill. Rev. Stat. 1969, ch. 38, par. 22-40) was denied equal protection of the law under the United States and Illinois Constitutions. Later,

in *People v. Meyerowitz* (1975), 61 Ill. 2d 200, 335 N.E.2d 1, the court held that the McCabe case must be given retroactive application and all persons convicted under section 38 are entitled to have their convictions expunged, and a refund of their fines and costs without interest.

The complaint in the present suit seeks the relief afforded by *Meyerowitz, i.e.,* an expungement of the convictions and a recovery of fines and costs for those persons convicted and sentenced under sections 3 and 38 of the 1969 Uniform Narcotic Drug Act (Ill. Rev. Stat. 1969, ch. 38, pars. 22-3, 22-40) in Champaign County.

During the pendency of this appeal, the legislature has passed and the Governor has signed a new law governing class actions, section 57.2 of the Civil Practice Act (Pub. Act 80-809), as basically proposed in K. Ford, *Class Actions in Illinois: Toward a More Attractive Forum for this Essential Remedy,* 26 DePaul L.Rev. 211 (1977). The law became effective on October 1, 1977. In *Steinberg v. Chicago Medical School* (Docket No. 48943, Dec. Term 1977), Ill. 2d , N.E.2d, the supreme court applied this new statute to a class action suit that had been filed before the statute was enacted. The court reasoned that a statute, procedural in nature, applies to cases currently pending. Therefore, our analysis in the present case must concern an application of the class action statute.

Section 57.2 of the Civil Practice Act lists four prerequisites for a class action: (1) The class is so numerous that joinder of all members is impractical; (2) there are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members; (3) the representative parties will fairly and adequately protect the interests of the class; and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy.

In this case, the trial court held that the plaintiff did not demonstrate that the number of possible class members is so great as to render separate litigation impossible or impractical. Little attention has been devoted to this requirement in Illinois and the courts have refrained from settling any specific minimum number of plaintiffs required for a class action. The test simply requires a case-by-case analysis.

When ruling on a motion to dismiss, all well-pleaded facts must be taken as true, albeit conclusions of law are not admitted. (*E.g., Acorn Auto Driving School, Inc. v. Board of Education* (1963), 27 Ill. 2d 93, 187 N.E.2d 722.) Plaintiff alleged in his complaint "that the number of possible members of the said class, being in the hundreds or thousands, renders separate litigation impossible or impractical." Defendant conceded that the class could include several hundred persons. The mere fact that there are numerous aggrieved parties, all of whom have similar claims against the defendant, is not alone sufficient to support a class action. (*Reardon v. Ford Motor Co.* (1972), 7 Ill. App. 3d 338, 287 N.E.2d 519.) However, only the potential number of members need be great enough to render separate litigation impractical. *C.f., DePhillips v. Mortgage Associates, Inc.* (1972), 8 Ill. App. 3d 759, 291 N.E.2d 329.

The trial court also found that plaintiff McCabe did not adequately demonstrate his ability to represent the class. Because of obvious due process requirements, there must be an adequate representation of the class if the judgment is to be binding on the absent members. (*Hansberry v. Lee* (1940), 311 U.S. 32, 85 L.Ed. 22, 61 S.Ct. 115.) There is no evidence in the record to indicate that plaintiff is not representative of the class.

The requirement that a representative adequately represent the class means that the representative must be a

member of the class he represents. (*Rodriquez v. Credit Systems Specialists, Inc.* (1974), 17 Ill. App. 3d 606, 308 N.E.2d 342.) The rule offers some assurance of the diligent and vigorous representation of the class. It is not disputed that the plaintiff in the instant case was convicted under the 1969 Uniform Narcotic Drug Act which was held unconstitutional, and that he is, therefore, a member of the class.

There must be no conflict of interest between the representative and the represented class members. (*Ross v. City of Geneva* (1976), 43 Ill. App. 3d 976, 357 N.E.2d 829, *aff'd* (Docket No. 49227, Jan. 1978 term), Ill. 2d , N.E.2d .) This record does not disclose nor suggest a conflict of interest. In the absence of some record suggestion that would warrant a finding that the representative will not fairly and adequately represent the class, the cause may proceed as a class action. See section 57.2 of the Civil Practice Act and *Landesman v. General Motors Corp.* (1976), 42 Ill. App. 3d 363, 356 N.E.2d 105.

Here, the plaintiff alleged in his complaint that he was a member of the class and there is no evidence that he is any way incapable of performing the functions of a class representative. The dismissal of the complaint upon a theory of inadequate representation was in error. The class members who do not wish to be represented in the class action may opt out. Sec. 57.5(b) of the Civil Practice Act (Pub. Act 80-809).

Defendants assert on appeal that plaintiff did not state an equitable cause of action and has no right or interest in notifying other persons of their right to relief under *Meyerowitz*. These arguments have been answered by the new class action statute. No longer must the cause of action be equitable, and the new statute provides for notice to absent class members in class action cases. (Secs. 57.2,

57.4, Civil Practice Act (Pub. Act 80-809).) The common fund requirement has also been abolished. *Steinberg.*

The trial court noted in its order of dismissal that a class action lawsuit would have the prospects of embarrassment and intrusion into the private lives of the members of the class. The court theorized that one may legitimately wish to conceal a past conviction from his present life. However, section 16 of "An Act to revise the law in relation to clerks of courts" (Ill. Rev. Stat. 1975, ch. 25, par. 16), provides that all records required to be kept by the circuit court are public records and shall be free to public inspection. There is no problem of privacy in the present suit. The procedure contemplated by the plaintiff would not intrude into the private lives of the parties. The fact that some members of the class may not seek relief because of some factor peculiar to them does not bar the class action. *Ross.*

The class action statute also requires that there be questions of fact or law common to the class and that these common questions must predominate over any questions affecting only individual members. There has been a great deal of litigation over this particular requirement. Numerous cases have discussed the issue of whether a class action may be maintained when the claims of the members require proof of defendant's liability to each particular member of the class. *Newberry Library v. Board of Education* (1944), 387 Ill. 85, 55 N.E.2d 147; *Peoples Store of Roseland v. McKibbin* (1942), 379 Ill. 148, 39 N.E. 2d 995; *Hagerty v. General Motors Corp.* (1974), 59 Ill. 2d 52, 319 N.E.2d 5; *Reardon v. Ford Motor Co.; Highsmith v. Allstate Insurance Co.* (1974), 17 Ill. App. 3d 615, 308 N.E.2d 204.

Several other cases have established that proof of separate transactions between the members of the class and the defendant does not automatically bar a class action. (*Moseid v. McDonough* (1968), 103 Ill. App. 2d 23, 243 N.E.

2d 394; *Brooks v. Midas-International Corp.* (1977), 47 Ill. App. 3d 266, 361 N.E.2d 815; *Cohon v. Oscar L. Paris Co.* (1958), 17 Ill. App. 2d 21, 149 N.E.2d 472; *Fiorito v. Jones* (1968), 39 Ill. 2d 531, 236 N.E.2d 698.) The courts have long recognized the confusion in this area, *Kruse v. Streamwood Utilities Corp.* (1962), 34 Ill. App. 2d 100, 108, 180 N.E.2d 731, 735, and in answer to it, the legislature has adopted the approach that was articulated in *Harrison Sheet Steel Co. v. Lyons* (1959), 15 Ill. 2d 532, 155 N.E.2d 595. There the court held that a class action is permissible if the common questions or facts are dominant and pervasive over the questions involving individual members.

In weighing the question of whether the common issues and fact questions predominate, the trial court must consider whether the class action would save time, effort, expense, and promote the uniformity as to those persons similarly situated. (39 F.R.D. 69, 102-103 (1966).) Many of these considerations are also involved in the fourth statutory requirement for a class action, *i.e.*, that the class action is a fair and efficient method to proceed with the suit.

In the instant case, defendants agree that the legal question of plaintiffs' right to refunds and an expungement of all the marijuana convictions under the 1969 Uniform Narcotic Drug Act has been decided by *Meyerowitz.* However, defendants argue that because the legal question of liability has already been decided in *Meyerowitz,* there would be no useful purpose in a class action here because it would only involve the resolution of individual fact questions. In addition, defendants point out that there are separate and distinct questions of fact that militate against a class action, that is, the trial court will have to determine whether each plaintiff was convicted under the Act and what amount of fines and costs each is entitled to have refunded.

This is the kind of case that is well-suited for a class action. The fact that the common legal right of the class to recover has already been decided does not defeat the class action. Other considerations that weigh into the process demonstrate that the common right to recover predominates over the individual questions. See *Steinberg* and *Ross.*

The administrative convenience is enhanced by dealing with all of the cases in one trial. When notice is given to the class, the judgment will be binding on all absent members. The individual fact questions are not the type that bar a class action.

Moreover, this class action avoids the economic impediment of individual filing fees by spreading the costs and attorney fees throughout the class. The action vindicates the rights of numerous claimants in one action when individual actions might be impractical. (*Adams v. Jewel Companies, Inc* (1976), 63 Ill. 2d 336, 348 N.E.2d 161.) We also note that the suit is limited to a manageable geographic area, i.e., Champaign County.

It is to be noted that all members of the class share a common right to a return of court costs because they were required to pay them. (Ill. Rev. Stat. 1969, ch. 38, par. 180-3.) Those who were fined will be entitled to that money also, and all members of the class are entitled to an expungement of their individual convictions. Thus, a large number of people who have suffered a similar injury from a single source, the common application of the same statute, are all entitled to similar relief.

We hold that in the present case all members of the class share a common decision of law which predominates over any questions affecting only individual members. Moreover, this class action is an appropriate method for the fair and efficient adjudication of the controversy.

Accordingly, the judgment of the circuit court is reversed and this cause is remanded for further proceedings in accordance with this opinion.

Reversed and remanded with directions.

REARDON, P.J., and TRAPP, J., concur.

I, THOMAS R. APPLETON, Clerk of said Appellate Court, do hereby certify the foregoing to be a true copy of the OPINION OF SAID COURT in said cause as the same appears from the records and files of my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and the seal of said Court, at Springfield, Illinois, this 18th day of July, 1979.

(SEAL)

/s/ Thomas R. Appleton
Clerk Appellate Court, Fourth Judicial Disrtict.

APPENDIX C

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

JAMES McCABE, etc.,
Plaintiff,
vs.
JAMES BURGESS, etc., *et al.*
Defendants.
No. 75-C-785

MEMORANDUM OPINION AND ORDER

This matter is here on the motion of defendants to dismiss the plaintiff's amended complaint. Arguments have been heard and the parties stand on their briefs heretofore filed.

Plaintiff purports to bring his action individually and in a representative capacity on behalf of those persons "convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving the sale, possession, or control of marijuana." Plaintiff asserts he brings a valid class action on behalf of those persons. Defendants have moved to dismiss on the basis that the amended complaint fails to state proper grounds for a class action under Illinois law.

The Court believes defendants' motion is well taken and in support thereof states as follows:

The question of law common to members of the purported class has been decided in *People v. McCabe,* 49 Ill. 2d 338; and *People v. Meyerowitz* and *People v. Weintraub,* 61 Ill. 2d 200.

One of the elements which must be present to sustain a class action is that the number of possible class members renders separate litigation impossible or impractical. *De-*

Phillips v. Mortgage Associates, Inc., 8 Ill. App. 3d 759. Or, stated another way, the utility of a class action is to avoid a multiplicity of suits.

This Court has heretofore, on motion of certain defendants in their individual cases, granted the relief decreed in *Meyerowitz* and *Weintraub.* The Court agrees with defendants that the following factual questions would need to be resolved respecting any member of the purported class: (1) was the purported class member in fact convicted under the portion of the statute held unconstitutional in *McCabe;* (2) is it expungement of the conviction alone or, in addition thereto, a return of fine and court costs to be ordered, the latter depending upon the sentence imposed. These are factual questions and require identification and examination of each court file involved.

It is difficult to perceive how proceeding in a class action would in any way relieve the court or litigants of any burden or time expended in resolving the factual questions material to each plaintiff's request. The Court agrees with defendants that plaintiff has not demonstrated that the number of possible class members is so great as to render separate litigation impossible or impractical.

Nor has plaintiff demonstrated that he can adequately represent the rights and interests of all other members of the purported class. Plaintiff's argument that potential members can opt out of the purported class if they so choose raises more questions than it answers. The Court agrees with defendants that the plaintiff here, James McCabe, is entitled only to the recovery of his fine and the expungement of his record if his court file reveals that he is entitled to that relief under the cases cited. He has no right or interest in the single act of notification of others who might be entitled to similar relief. Although notice is a clear element of a class suit, the simple desire to notify other potential claimants is not justification, in

and of itself, for the maintenance of a class action. This is particularly a consideration here when coupled with the obvious fact that in this case a class action would in no way render the disposition of the individual, factual questions any more expeditious. Avoiding a multiplicity of suits means avoiding repetitive litigation and the onerous, repetitive demand upon witnesses and the presentation of evidence. It dos not mean avoiding the necessary, perfunctory factual determination presented here, a determination that would necessarily have to be made whether there were individual requests or a class action with no saving of the court's or litigant's time whichever mode was utilized.

Finally, the Court has what is believed to be a serious concern here. It is alluded to by defendants and is perhaps unique in class action litigation. However constructed, notice to former defendants in criminal cases, after the passage of time since *McCabe,* has the potential for embarassment, at the least, and an improper intrusion into the private life of the persons involved, with all the potential, however remote, of communication of a person's past to those he or she now legitimately may wish it concealed from. Further, the necessary admission of plaintiff to every criminal file in Champaign County in pursuance of his effort to isolate the appropriate cases for purposes of his action, seems to be clearly repugnant to Federal privacy dictates.

For all of these reasons the Court believes plaintiff's complaint must be dismissed. Accordingly, plaintiff's amended complaint is hereby dismissed with prejudice. Further, it is ruled that there is no just reason to delay enforcement or appeal of this order.

Enter: May 23, 1977

/s/ Harold L. Jensen
Harold L. Jensen, Circuit Judge

CERTIFICATE

IN THE CIRCUIT COURT OF
CHAMPAIGN, COUNTY, ILLINOIS

I, Betty J. Mallow, Clerk of the Circuit Court in and for the County, State aforesaid, and keeper of the Records, Files and Seal of said Court, do hereby certify that the foregoing is a true and complete copy of Memorandum Opinion and Order in the matter of

James McCabe, etc.,
Plaintiff,
vs.
James Burgess, etc., et al.,
Defendants.
No. 75-C-785

as the same appears from the records and files now in this office remaining.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Official Seal of Said Court, at my office in Urbana, Illinois, this 18th day of July, A.D. 1979.

(SEAL)

/s/ Betty J. Mallow
Clerk of the Circuit Court

APPENDIX D

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ILLINOIS
PEORIA COUNTY

LESLIE D. SPARKS, individually and in a representative capacity on behalf of a class of persons, consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving sale, possession or control of marijuana,
Plaintiffs,
vs.
ROBERT CALKINS, State's Attorney for Peoria County and EDWARD T. O'CONNOR, Peoria County Treasurer,
Defendants.
NO. 72 E 871

JUDGMENT

This cause having come on for hearing, on July 17, 1975, on the Plaintiffs' Motion for Summary Judgment, and the Court having heard the argument of counsel and having considered legal memoranda submitted in support and in opposition to said Motion, and, further, the Court being fully advised in the premises;

IT IS HEREBY ADJUDGED AND DECREED that:

1. The judgments of conviction heretofore entered against the Plaintiffs individually be, and the same shall be vacated and set aside and the cases filed against each said member of the class shall be dismissed with prejudice.

2. All fines and Court costs collected from each member

of the class shall be refunded in accordance with the terms and conditions hereinafter provided.

3. The attorneys for the Plaintiffs, McCONNELL, KENNEDY, QUINN & MORRIS, shall be entitled to receive from the Peoria County Treasurer twenty-five percent (25%) of the total amount of all fines and Court costs heretofore paid by and which are to be refunded to the members of the class which said percent is to be deducted from the amount of the fines and Court costs to be refunded to each member of said class.

4. That, within thirty (30) days from the date hereof, counsel for the Plaintiffs and counsel for the Defendants shall review the files concerning each member of said class in order to determine the amount of fine and Court costs to be refunded to the respective members of said class and after said computation has been made, counsel for the Plaintiffs shall forthwith notify each member of said class of his entitlement to a refund of the fine and/or Court costs paid by the respective members of the class.

5. That the aforesaid payments by the Peoria County Treasurer, to the attorneys for the members of the class and to each member of the class, shall be made within sixty (60) days from the date of the entry of this Order.

/s/ Charles Iben
Judge

DATED: Aug. 14, 1975

CERTIFICATE
STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT
PEORIA COUNTY

I, MICHAEL J. UNRUH, Clerk of the above named Court and keeper of the Records, Files and Seal thereof, do hereby certify that the above and foregoing is a full, true and correct copy of

LESLIE D. SPARKS, individually, and in a representative capacity on behalf of a class of persons, consisting of person convicted for violation of the 1969 Illinois Uniform Narcotic Drug Act involving sale, possession or control of marijuana, Plaintiff, vs. ROBERT CALKINS, State's Attorney for Peoria County and EDWARD T. O'CONNOR, PEORIA COUNTY TREASURER, Defendant.	No. 72 E 871

a certain JUDGMENT filed on the 14th day of AUGUST, 1975, as the same appears from the records and files now in this office remaining.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the above named Court, at my office in Peoria, this 19th day of JULY A.D. 1979.
(SEAL)

MICHAEL J. UNRUH
CLERK OF THE CIRCUIT COURT
By /s/ Montreere Sephus
Deputy Circuit Clerk

Supreme Court, U. S.
FILED
SEP 18 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-246

JAMES McCABE, individually and in a representative capacity on behalf of a class of persons consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving sale, possession or control of marijuana,

Petitioner,

vs.

JAMES BURGESS, State's Attorney for Champaign County; and JAMES SKELTON, Champaign County Treasurer; and LAWRENCE JOHNSON, State's Attorney for Champaign County from 1968 through 1972; and CHAMPAIGN COUNTY, a body corporate and politic,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

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JAMES McCABE, individually and in a representative capacity on behalf of a class of persons consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving sale, possession or control of marijuana,

Petitioner,

vs.

JAMES BURGESS, State's Attorney for Champaign County; and JAMES SKELTON, Champaign County Treasurer; and LAWRENCE JOHNSON, State's Attorney for Champaign County from 1968 through 1972; and CHAMPAIGN COUNTY, a body corporate and politic,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Respondent, Champaign County, a body corporate and politic, prays that this Honorable Court deny the Petitioner's request for a Writ of Certiorari.

STATEMENT OF THE CASE

In order to further clarify the record before this Honorable Court, the Respondent would state the following facts.

Subsequent to the filing of the original complaint by the

Petitioner (July 31, 1975), several motions to dismiss as to individual defendants were filed. Motions to dismiss on behalf of Defendants James Burgess, James Skelton and Lawrence Johnson were heard and allowed. The only Defendant (Respondent) before this Court is Champaign County (R.15).

On May 23, 1977, the trial court granted the Defendant's motion to dismiss concluding that all the prerequisites necessary for the maintenance of a class action had not been met by the Petitioner.

During the pendency of the Petitioner's appeal to the Fourth District Appellate Court of Illinois, Public Act 80-809 became law and added sections 57.2 through 57.7 to the Civil Practice Act (Illinois Revised Statutes of 1977, Chapter 110, Sections 57.2-57.7). The Illinois Supreme Court held in *Steinberg v. Chicago Medical School,* 69 Ill. 2d 320, 371 N.E. 2d 634, 13 Ill. Dec. 699 (1977), that the new sections of the Illinois Civil Practice Act were procedural in nature and therefore applied to all pending litigation. Applying the criteria established by Sections 57.2-57.7, the Illinois Supreme Court affirmed the trial court's conclusion that the Petitioner had not met all the prerequisites necessary for a class action. *(McCabe v. Burgess,* 75 Ill. 2d 457, 389 N.E. 2d 565, 27 Ill. Dec. 501, 1979).

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. No federal constitutional question was seasonably raised in the Illinois courts.

The Petitioner, pursuant to his amended complaint (Appendix A), requested the right to notify members of an "alleged class", to vacate any judgments of conviction, to collect fines paid and to receive compensation for the plaintiff's counsel. The trial court dismissed the plaintiff's amended complaint. In its discretion, the trial court found that: 1) the plaintiff did not demonstrate that the number of possible class members was so great as to render separate litigation impossible or impractical; 2) the plaintiff did not adequately demonstrate his ability to represent the class; 3) there were no remaining questions of law or fact common to all parties; and 4) there would be no increased judicial efficiency through the use of a class action.

The issue presented before the Fourth Appellate Court (Appendix B) and the Illinois Supreme Court (Appendix C and D) was also the validity of the trial court's refusal to certify a class action. There was never any argument or evaluation of the trial court's decision or the Illinois Class Action Statute in terms of equal protection and due process. The issue presented by the Petitioner, although a clever attempt to manufacture a federal constitutional question, is really a determination whether a trial court has abused its discretion. This allegation of abuse of trial court discretion is not a constitutional issue. The Federal courts have considered a similar type of ruling pursuant to Federal Rule 23 and reverse only if there is clear abuse.

> "Class certification under Federal Rule 23 of the Federal Rules of Civil Procedure is a matter within the discretion of the trial court. *(Montgomery v. Rumsfeld,*

[9th Cir. 1978], 572 F. 2d 250, 255; *City of New York v. International Pipe & Ceramics Corp.* [2d Cir. 1969], 410 F. 2d 295, 298.) When the trial court applies the criteria of Rule 23 to the facts of the case, it 'has a broad discretion in determining whether the action may be maintained as a class action and its determination should be given great respect by a reviewing court.' (3B J. Moore, Federal Practice sec. 23-437 [2d ed. 1978].) Only a clear abuse of discretion or an application of impermissible legal criteria as shown justifies a reversal of the trial court. *(Yamamoto v. Omiya* [9th Cir. 1977], 564 F. 2d 1319, 1325; *Carey v. Greyhound Bus Co.* [5th Cir. 1974], 500 F. 2d 1372, at 1380.)" *(McCabe v. Burgess,* 75 Ill. 2d 457 at 464, 389 N.E. 2d 565, 27 Ill. Dec. 501 [1979].)

The Petitioner's arguments on freedom of association, equal protection and due process were never presented to the trial and Illinois Appellate Courts. The Illinois Supreme Court succinctly stated the issue:

> "The primary issue presented for review is the validity of the trial court's refusal to certify a class action." *(McCabe v. Burgess,* 75 Ill. 2d 457 at 461-462, 389 N.E. 2d 565, 27 Ill. Dec. 501 [1979].)

The long-established general rule is that the attempt to raise a federal question after judgment comes too late unless the state trial court has been presented and decided the federal question. In the case of *Herndon v. Georgia,* 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935), the defendant challenged his criminal conviction before the United States Supreme Court on due process grounds which were never raised in the State courts. His appeal was dismissed by the U. S. Supreme Court:

> "We find it unnecessary to review the points made, since this court is without jurisdiction for the reason that no federal question was seasonably raised in the Court below or passed upon by that court." *(Id.* at 442).

In *Cardinale v. Louisiana,* 394 U.S. 437 at 438 and 439, 89 S.Ct. 1162, 22 L.Ed. 2d 398, (1969), a defendant accused of murder objected to the admission of allegedly irrelevant and prejudicial parts of his confession. He also challenged the state statute which required that all confessions be admitted into evidence in their entirety as being unconstitutional.

> "Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller v. Nicholls,* 4 Wheat. 311, 315 (1819), and since *e.g., Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn., Inc.,* 360 U.S. 334, 342, n. 7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel,* 324 U.S. 154, 160-163 (1945); *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434-435 (1940); *Whitney v. California,* 274 U.S. 357, 362-363 (1927); *Dewey v. Des Moines,* 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis,* 20 Wall. 590 (1875).

In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio,* 385 U.S. 92 (1966), they should be given the first opportunity to consider them.

In view of the petitioner's admitted failure to raise the issue he presents here in any way below, the failure of the state court to pass on this issue, the desirability of giving the State the first opportunity to apply its statute on an adequate record, and the fact that a federal habeas remedy may remain if no state procedure for raising the issue is available to petitioner, the writ is dismissed for want of jurisdiction." *(Cardinale v. Louisiana,* 394 U.S. 437 at 438, 439, 89 S.Ct. 1162, 22 L.Ed. 2d 398, [1969].)

In this cause the Petitioner, like the defendant in *Cardinale,* requests a review pursuant to 28 U.S.C. §1257 (3). A review of the pertinent prior requests made and decisions rendered by the Illinois Courts clearly establishes that the Petitioner's constitutional arguments were never presented to the State courts. Therefore, the Petitioner's request for certiorari should be denied.

II. Petitioner's request was not a proper class action.

First, Respondent submits that the request for certiorari should be denied for the reasons stated in our Point I. Furthermore, if this Court were to look at the Illinois Supreme

Court decision, it will conclude that Petitioner's actions did not constitute a proper class. In reality, the only reason the Petitioner sought to designate his cause of action a "class action" was so that he could notify persons affected by *McCabe* and *Meyerowitz, (People v. McCabe,* 49 Ill. 2d 338, 275 N.E. 2d 407, 1971; *People v. Meyerowitz,* 61 Ill. 2d 200, 335 N.E. 2d 1, 1975) and so that his attorney could collect a percentage of all fines previously paid. There is no basis to contend that a right of association has been violated.

As previously stated, Petitioner never claimed before the Illinois courts that the trial court's decision infringed upon his freedom to associate with others. Freedom of association is not equivalent to the right to notify total strangers. In this cause the Petitioner is really asking this Court for permission to solicit potential clients and his recognition of that fact is shown by his arguments in Point I of his Petition. The Petitioner has not in any way been prevented from redressing his grievance. In fact, the Illinois Supreme Court has granted him the relief requested and the Petition recognizes this but seeks to tell others about it (p. 9 of Petition). The right of association is not involved in the Petitioner's request for permission to notify other people of the Illinois Supreme Court's action. As the trial court noted on its written opinion (Petitioner's Appendix C-2):

> He (the Petitioner) "has no right or interest in the single act of notification of others who might be entitled to similar relief. Although notice is a clear element of a class suit, the simple desire to notify other potential claimants is not justification, in and of itself, for the maintenance of a class action."

The cases cited by the Petitioner hold that collective activity undertaken to obtain meaningful access to the

Courts is a fundamental right. This fundamental right has already been protected and the only issues remaining are:

> ". . . questions which would affect only individual members of the class, such as the nature of the offense of which they were convicted and the amount of fines and costs paid." *(McCabe v. Burgess,* 75 Ill. 2d 457 at 466, 389 N.E. 2d 565, 27 Ill. Dec. 501 [1979].)

The Petitioner's equation that freedom of association is the need to notify all people is unsound. For centuries our system of justice has relied upon the presumption that "all men know the law." The true import of the Petitioner's argument when taken to its logical conclusion would require Congress to notify each and every individual citizen of the United States of each and every law enacted. Every court would also be required to notify all potentially interested persons of its decision or risk a violation of the person's right to freedom of association.

There has been no restriction of the Petitioner's rights to associate by the court decisions in this cause. Any right to notification is not synonymous with freedom to associate and, therefore, the trial court did not abuse its discretion in dismissing the Petitioner's class action suit.

III. There has been no denial of due process to the Petitioner by the action of the Illinois courts.

As previously stated, the Petitioner's claim must fail since he did not seasonably raise this due process issue before the Illinois courts. The Petitioner did not contend in the State court that he was being denied the opportunity to be heard. The facts show conclusively that the Petitioner has been afforded his procedural due process.

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite." (*Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 92 S.Ct. 2701 at 2705, 33 L.Ed.2d 548 [1972].)

The Petitioner has been afforded his hearing in court and is entitled to have his conviction vacated and to have any fine paid refunded to him. There has been no lack of opportunity to be heard. Likewise, the Petitioner has been notified of his rights by the Illinois Supreme Court decisions in *McCabe* and *Meyerowitz.*

The Petitioner's reliance on the *Neely* case (*Neely v. United States,* 546 F.2d 1059 [3rd Cir. 1976]) is misplaced. Prior to the filing of the class action in *Neely,* the United States Supreme Court had found a federal criminal statute unconstitutional and had given that decision full retroactivity. No prior decision had determined the right of those convicted under the unconstitutional statute to recover fines and costs. The *Neely* court concluded that there was an important common question of law presented for resolution. In this case, the questions of law and fact that the members of the purported class share in common have all been resolved. The remaining questions are individual factual matters which are not common to each member of any alleged class. They are: 1) was the purported class member in fact convicted under the relevant portion of the Uniform Narcotic Drug Act held unconstitutional; and 2) what sentence was imposed by the trial court on that individual; and 3) does that person wish to avail himself of the relief granted by *Meyerowitz.* Just as these questions which remain to be answered are individual and require the identification and examination of each court file involved, so too does the granting of relief to each person since an order must be entered in each individual case vacating the conviction and returning the exact amount

of money which each person had paid as his/her fine and costs.

From *McCabe* and *Meyerowitz* clear access to the courts has been established. All aggrieved persons will be heard by the courts. Anyone aggrieved must simply present himself/herself, show the void conviction and request a full refund. No judicial economy would be accomplished by a class action. No common questions of fact or law remain which predominate over any questions affecting only individuals. There has been no due process violation by the Illinois judicial proceedings.

IV. There was no violation of the Petitioner's equal protection rights.

Again, the Petitioner requests a writ of certiorari for an issue never presented to the Illinois Courts. Pursuant to our previous arguments, Respondents would again submit that the Petitioner failed to raise the issue he presents in any way below, that the State court did not pass on this issue and that it is desirable to give the State the first opportunity to consider such matters.

Furthermore, there has been no denial of the Petitioner's access to the courts. The Illinois Supreme Court in *People v. Meyerowitz,* 61 Ill.2d 200, 335 N.E.2d 1 (1975) held that all people convicted under Section 22-40 of Chapter 38 of the Uniform Narcotic Drug Act were entitled to a return of any fines paid as a result of their conviction. Any person affected by that decision can request a refund. Each case would have to be reviewed individually to determine whether and for what offense a conviction was entered and whether any fines or costs were paid. The Champaign County Courthouse is accessible for anyone who wants the above-described relief. The decision of the Peoria Circuit Court presents no precedent for the Illinois higher courts, nor for

this Court and clearly does not deny the Petitioner any equal protection rights.

There is nothing illusory about the remedy given to all people affected by the *McCabe and Meyerowitz* decisions. Any person convicted of the former section 38 of the Uniform Narcotic Drug Act can present himself/herself before a Champaign County Judge and obtain the immediate individual treatment his/her case warrants. There would be no filing fees involved in these criminal matters and the Petitioner's analogy to Boddie and Carter is misplaced. The Illinois courts clearly stated:

> "We are of the opinion that the money, having been received in payment of fines imposed as an incident to judgments of conviction, should be ordered refunded as an incident to the vacation of the judgments under which it was ordered paid." (*People v. Meyerowitz,* 61 Ill.2d 200, 335 N.E.2d 1 at 8 [1975].)

The Petitioner's fundamental rights to association, petition and meaningful access to the courts have not been burdened. The Illinois Supreme Court provided an easy system for each individual to have his conviction vacated and any fines and costs paid by him to be refunded. There has been no Equal Protection violation.

CONCLUSION

The Petitioner's Request for a Writ of Certiorari presents no federal constitutional question which was seasonably raised in the Illinois courts. The trial court properly exercised its discretion and determined that the Petitioner did not have a class action. There were no remaining issues of law or fact to be determined. The access of any aggrieved person is now easy and simple. Each person must notify the court system in Champaign County of his or her erroneous conviction and request the reimbursement of any fines paid.

For the reasons stated heretofore, Respondent respectfully requests a denial of the Petition for a Writ of Certiorari.

Submitted by:

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APPENDIX

Appendix A-1

PRAYER OF PLAINTIFF'S AMENDED COMPLAINT:

WHEREFORE, the Plaintiff and all other members of the same class pray for the following relief:

a. That plaintiff, James McCabe, by his attorneys, Auler Law Offices, be granted freedom to notify the said members of the said class of their legal position and potential remedies such that they choose whether or not to opt out of the said class action, and that plaintiff be permitted access to the necessary files and information concerning the names and addresses of the members of the class to achieve the said notice, and that discovery be authorized by the court for the attorney of plaintiffs to determine said notice.

b. That the judgments of convictions heretofore entered against them for violation of sub-paragraphs (2), (3), (5) or (6) of paragraph 22-40 of Chapter 38, 1969 Illinois Revised Statutes be vacated and set aside.

c. That following notification of the class, as to who do not opt out of the class, the Champaign County Treasurer and Champaign County State's Attorney, shall render an accounting of all fees, costs and fines collected from the plaintiff and other members of the same class and the monetary value of all days the plaintiff and other members of the same class were imprisoned and, further, that said defendants shall supervise the refund of said sums to the persons entitled thereto.

d. That Auler Law Offices be awarded reasonable and proper attorney fees from the monies to be refunded to the plaintiff and other members of the same class.

Appendix B-1

ISSUES PRESENTED BY THE PETITIONER TO FOURTH DISTRICT APPELLATE COURT

NO. 14486
IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

JAMES McCABE, individually and in a representative capacity on behalf of a class of persons, consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving the sale, possession, or control of marijuana, Plaintiff-Appellant, vs. JAMES BURGESS, State's Attorney for Champaign County; and JAMES SKELTON, Champaign County Treasurer; and LAWRENCE JOHNSON, State's Attorney for Champaign County from 1968 through 1972; and CHAMPAIGN COUNTY, a body corporate and politic, Defendants-Appellees.	Appeal from the Circuit Court of Champaign County, Illinois No. 75-C-785 HONORABLE HAROLD L. JENSEN Judge Presiding

BRIEF OF PLAINTIFF-APPELLANT

ROBERT I. AULER
Auler Law Offices
202 W. Green Street
Urbana, IL 61801
(217) 384-3080

ORAL ARGUMENT REQUESTED

Appendix B-2

NATURE OF THE CASE

Plaintiff-Appellant, James McCabe, brought an action, both individually and as a class action to have the criminal records of the class members expunged and to have their fine monies returned. The trial court found that the case was an improper one for a class action and granted defendant's motion to dismiss plaintiff's complaint. From this dismissal, plaintiff appeals.

Notice of Appeal was filed June 21, 1977.

ISSUES PRESENTED

I. Whether the trial court erred in dismissing plaintiff's complaint on the basis that it failed to state proper grounds for a class action.

A. Whether the trial court erred in finding that the number of potential class members was not large enough to justify a class action.

B. Whether the trial court erred in finding that the plaintiff had not adequately demonstrated his ability to represent the class.

Appendix C-1

ISSUES PRESENTED BY THE PETITIONER
TO THE ILLINOIS SUPREME COURT

NO. 50676
IN THE
SUPREME COURT OF ILLINOIS

JAMES McCABE, individually and in a representative capacity on behalf of a class of persons, consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving the sale, possession, or control of marijuana,
Plaintiff-Appellant,

vs.

JAMES BURGESS, State's Attorney for Champaign County; and JAMES SKELTON, Champaign County Treasurer; and LAWRENCE JOHNSON, State's Attorney for Champaign County from 1968 through 1972; and CHAMPAIGN COUNTY, a body corporate and politic,
Defendants-Appellees.

Appeal from the
Circuit Court of
Champaign County, Illinois

No. 75-C-785

HONORABLE
HAROLD L. JENSEN
Judge Presiding

BRIEF OF PLAINTIFF-APPELLEE

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Assisted by:
Mark DeBofsky
University of Illinois
Law Student

ORAL ARGUMENT REQUESTED

Appendix C-2

ISSUE PRESENTED FOR REVIEW

I. WHETHER the trial court committed error by failing to certify this cause as a class action.

A. WHETHER Plaintiff is a suitable representative of the purported class.

B. WHETHER there is a common question of fact or law shared by all members of this class.

C. WHETHER the proposed class meets the numerosity requirement.

D. WHETHER the resolution of this matter through a class action suit is the fairest and most efficient means of adjudicating this cause.

Appendix D-1

ISSUES PRESENTED BY THE PETITIONER AT HIS REQUEST FOR REHEARING BEFORE THE ILLINOIS SUPREME COURT

NO. 50676
IN THE
SUPREME COURT OF ILLINOIS

JAMES McCABE, individually and in a representative capacity on behalf of a class of persons, consisting of persons convicted for violations of the 1969 Illinois Uniform Narcotic Drug Act involving the sale, possession, or control of marijuana, Plaintiff-Appellant, vs. JAMES BURGESS, State's Attorney for Champaign County; and JAMES SKELTON, Champaign County Treasurer; and LAWRENCE JOHNSON, State's Attorney for Champaign County from 1968 through 1972; and CHAMPAIGN COUNTY, a body corporate and politic, Defendants-Appellees.	Appeal from the Circuit Court of Champaign County, Illinois No. 75-C-785 HONORABLE HAROLD L. JENSEN Judge Presiding

PRAYER

Petitioner, James McCabe hereby petitions for rehearing of this cause and asks that this Court reverse its decision and affirm the decision of the Appellate Court of Illinois for the Fourth Judicial District ordering certification of the plaintiff class.

Appendix D-2

GROUNDS FOR REHEARING

1. This honorable Court mischaracterized the question common to the members of this class.

2. Improper standards were applied in determining the inappropriateness of a class action in the instant matter.

3. Consistency in judicial decisions would not be served by allowing the identical suit to proceed as a class action in another county of this State while denying such a procedure in Champaign County.